(3)

No. 89-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RON BROWN, ET AL.,

Petitioners,

v.

VIAL, HAMILTON, KOCH & KNOX, ET AL.,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION

JAMES E. COLEMAN, JR.
COUNSEL OF RECORD
THERESA A. COUCH
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL
200 Crescent Court
Suite 1500
Dallas, Texas 75201
(214) 855-3000

Counsel for Respondents

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QUESTIONS PRESENTED

1. Did the Court of Appeals review the District Court's dismissal of Petitioners' federal claims consistently with the law of the other circuits?
2. Did the Court of Appeals correctly conclude the lower court's ruling that Petitioners did not have standing to assert a private antitrust claim was consistent with the law of the other circuits?
3. Did the Court of Appeals correctly conclude that Brown's allegations that the State Court proceeding was a "sham" judgment did not sufficiently raise a factual issue that would preclude summary judgment?
4. Did the Court of Appeals correctly conclude that Petitioners do not raise an equal protection claim?
5. Did the Court of Appeals correctly conclude that Petitioners do not raise a due process claim?

LIST OF PARTIES

1. Ron Brown
   Ron Brown & Associates

2. Vial, Hamilton, Koch & Knox
   Byron L. Falk
   Touchstone, Bernays, Johnston, Beall & Smith
   Wade C. Smith
   Sidney H. Davis, Jr.
   Passman, Jones, Andrews & Holley
   Shannon Jones, Jr.
   Johnson, Bromberg & Leeds
   Robert R. Roby
   Robert W. Hartson, Inc.
   Robert W. Hartson
   State Unauthorized Practice of Law Committee,
   State Bar of Texas
   Jim Bloom a/k/a "James D. Blume"
   State Farm Mutual Automobile Insurance Co.
   Harlan D. Holiner
   Donovan Elliott
   Ohio Casualty Insurance Co.
   Trelby Edwards
   Dick Gallatin
   Fireman's Fund Insurance Co.
   Ron Watson
   Van Sims
   Members Insurance Group
   Ruth Hunter
   Leonard Adkins

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Sup. Ct. R. 17

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Respondents Vial, Hamilton, Koch & Knox, Byron L. Falk, Touchstone, Bernays, Johnston, Beall & Smith, Wade C. Smith, Sidney H. Davis, Jr., Passman, Jones, Andrews & Holley, Shannon Jones, Jr., Johnson, Bromberg & Leeds, Robert R. Roby, Robert W. Hartson, Inc., Robert W. Hartson, State Farm Mutual Automobile Insurance Co., Harlan D. Holiner, Donovan Elliott, Ohio Casualty Insurance Co., Trelby Edwards, Dick Gallatin, Fireman's Fund Insurance Co., Ron Watson, Van Sims respectfully request that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

A. The Course of Proceedings and Disposition in the Federal Courts

On November 9, 1987, Ron Brown and Ron Brown & Associates (collectively referred to as "Brown") filed a complaint in the United States District Court for the Northern District of Texas, Dallas Division, alleging violations of the Sherman Act (15 U.S.C. §1, *et seq.*), violations of the First, Fifth and Fourteenth Amendments of the United States Constitution, libel, slander and tortious interference with contracts. All of the defendants, including these Respondents Vial, Hamilton, Koch & Knox, Byron L. Falk, Touchstone, Bernays, Johnston, Beall & Smith, Wade C. Smith, Sidney H. Davis, Jr., Passman, Jones, Andrews & Holley, Shannon Jones, Jr., Johnson, Bromberg & Leeds, Robert R. Roby, Robert W. Hartson, Inc., Robert W. Hartson, State Farm Mutual Automobile Insurance Co., Harlan D. Holiner, Donovan Elliott, Ohio Casualty Insurance Co., Trelby Edwards, Dick Gallatin, Fireman's Fund Insurance Co., Ron Watson, Van Sims, filed motions for dismissal or for summary judgment and sanctions. After considering the pleadings, briefs and other documents submitted by all parties, the District Court entered a Memorandum Order and Judgment on May 12, 1988, granting the defendants' motions to dismiss and motions for summary judgment and denying their motions for sanctions. Brown appealed that final judgment to the Court of Appeals for the Fifth Circuit. On April 18, 1989, the Court of Appeals affirmed the District Court ruling granting summary judgment on the federal claims and dismissing the state claims. On May 12, 1989, the Court of Appeals denied Brown's petition for rehearing.

B. The Course of Proceedings in the State Courts

Prior to the filing of the federal court action, the State Unauthorized Practice of Law Committee (the "State Committee") sought an injunction against Brown in the 160th District Court of Dallas County, Texas in Cause No. 86-8566-H. On November 26, 1986, the 160th Judicial District Court entered judgment that Brown had engaged in the unauthorized practice of law and Brown was permanently enjoined from his illegal activities. These illegal activities included advising clients on the settlement of insurance claims. The injunction against Brown was affirmed on appeal. *Brown v. Unauthorized Practice of Law Committee*, 742 S.W.2d 34 (Tex. App. — Dallas 1987, writ ref'd). During the pendency of the suit in the 160th Judicial District Court, Brown filed suit against various insurance companies and insurance company employees for violations of his constitutional rights and for libel. The defendants named by Brown in the state court suit are among the defendants in the federal case. On January 6, 1987, a summary judgment was entered on behalf of all the defendants in Brown's state court action. Brown appealed the summary judgment to the Dallas Court of Appeals. On March 18, 1988, the Dallas Court of Appeals affirmed the judgment in an unpublished opinion.

After unsuccessfully litigating with the State Committee over specific activities determined to be the unauthorized practice of law and unsuccessfully litigating with certain insurance companies, individual employees of insurance companies and the State Committee on claims of libel and constitutional violations, Brown filed suit in federal court seeking reconsideration of many of the same issues as in the two state court lawsuits. The federal court action named all of the state court partici-

pants as defendants as well as additional defendants. The claims in the federal court centered around alleged antitrust violations and various constitutional claims.

OBJECTIONS TO WRIT

A review on writ of certiorari is a matter of judicial discretion, not a matter of right. The rules of this Court state that a review on writ of certiorari will be granted "only when there are special and important reasons." Sup. Ct. R. 17 (1989). Among the reasons for granting review on writ of certiorari are the following: (1) when a federal court of appeals has rendered a decision in conflict with another federal court of appeals on the same matter or has decided a federal question in a way to conflict with a state court of last resort; (2) when a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort; and (3) when a state court or a federal court of appeals has decided an important question of federal law which has not been and should be settled by this Court. *Id.* None of those circumstances exist in this case. Petitioners attempt to raise the questions in such a way as to suggest that the federal court of appeals decision is in conflict with the decisions of state courts of last resort or that the federal court of appeals decision is in conflict with the decision of a court of appeals in another circuit. Neither is true here. Indeed, the decision in the court of appeals is consistent with the law of other circuits and consistent with the decisions of the various state courts of last resort.

REASONS FOR DENYING WRIT

SUMMARY OF ARGUMENT

The Fifth Circuit's affirmance of the summary judgment and dismissal of Petitioners' claims neither conflicted with the decisions of other circuits nor misapplied the law. The decision, followed the established principles that the integrity of the Bar is a public concern and a state should not be deterred or diverted from disciplinary proceedings by interference from a federal court. The Court of Appeals correctly held that certain of Petitioners' activities had been determined by the state courts to be the unauthorized practice of law and thus the judgment in the state courts could not be attacked in the federal court proceeding.

The Court of Appeals correctly held that Petitioners did not have standing to assert antitrust claims because they did not seek to protect a legally cognizable business from injury. Petitioners unsuccessfully attempted to argue that the state court judgment was a "sham" judgment.

Petitioners unsuccessfully attempted to create an equal protection argument out of the action by the state to protect the integrity of the Bar and ultimately to protect the citizens of the state from the unauthorized practice of law. The Court of Appeals correctly held that there was no equal protection violation.

ARGUMENT

I. A STATE ACTING AS A SOVEREIGN HAS THE POWER TO PLACE RESTRAINTS ON THE PRACTICE OF LAW.

Petitioners phrase their issues in an attempt to create an argument that the decisions by the Texas courts are in conflict with other state courts of last resort on the application of the equal protection clause to the adjustment of personal injury or property claims. Although Petitioners purport to bring this as a petition for writ of certiorari on the affirmance by the Court of Appeals for the Fifth Circuit, they also attempt to complain about the Texas Supreme Court decision not to review the lower state court decisions in the related cases. Petitioners argue that the Court of Appeals should have vacated the state court judgments that identified certain of Petitioners' activities as constituting the unauthorized practice of law.

A state acting as a sovereign has the authority to regulate the legal profession. The restrictions placed on the legal profession are compelled by the directions of the state acting as a sovereign. *Bates v. State Bar of Arizona*, 433 U.S. 330, 359-60 and n. 11 (1977). The Texas courts determined that certain of Petitioners' activities constitute the unauthorized practice of law and enjoined Petitioners from engaging in those specific activities.

A. There is No Conflict Among the States

Petitioners erroneously argue that the highest courts in Ohio and Missouri have reached decisions contrary to that of the Texas courts. Petitioners initially argue that the Ohio Supreme Court has reached a contrary decision from that reached by the Texas courts. Petitioners'

reliance on *Goodman v . Beall*, 130 Ohio St. 427, 200 N.E. 470, 471-473 (Ohio 1936) is misplaced. In the *Goodman* case the Ohio court held that a lay person may assist another in the submission of claims and appear as a representative at proceedings until the claim is first denied. This limited role recognized by the Ohio court differs significantly from the activities prohibited by the Texas courts. The Texas courts specifically carved out those activities that necessarily constitute the unauthorized practice of law. These activities center on offering advice in negotiating the payment of monies in settlement of claims, not merely clerical functions involved in making claims.

Petitioners further rely on *Liberty Mutual Insurance Company v. Jones*, 130 S.W. 945, 961-962 (Mo. 1938) for the proposition that Petitioners can engage in the activities the Texas court precluded. Petitioners' reliance on *Liberty Mutual* is also misplaced. The Missouri court in *Liberty Mutual* also limited the activities in which a lay person may engage. The activities were limited by the Missouri court in much the same way as Petitioners' activities were limited by the Texas courts. Petitioners attempted to negotiate settlements of claims, not simply assist a claimant in the submission of a claim. In negotiating a settlement on behalf of a citizen, the lay representative must necessarily be involved to some extent in a question of legal liability. It is that activity that is precluded by all of the cases cited by Petitioners as well as by the Texas courts in Petitioners' case. The court in *Liberty Mutual* only permitted a lay person to be involved in attempting to adjust *undisputed* claims. Petitioners do not limit their activities in such a manner. It is Petitioners' failure to limit their activities that caused the Texas court to issue the injunction.

The opinions of the Ohio and Missouri courts support the position of the Texas courts. Both courts agreed that a lay person is limited in the extent of his involvement in an insurance claim. He may participate to the extent of helping with routine clerical functions to submit a claim and he may represent an individual before some administrative board only if the claim is undisputed or uncontested.

B. There is No Equal Protection Violation.

Petitioners next argue that there is an equal protection violation because of the Texas statutory provisions governing the regulation of insurance adjusters. Because Petitioner Ron Brown represents that he is a licensed insurance adjuster, he believes he is entitled to perform the activities from which he was enjoined by the state court. Petitioners fail to recognize that the activities from which Brown was enjoined are not the same activities permitted by a licensed insurance adjuster. Additionally, the statutory provision permits a licensed insurance adjuster to "investigate or adjust losses on behalf of either an insurer or a self-insured, or any person who supervises the handling of claims." Tex. Ins. Code Art. 21.07-4 §1(a) (Vernon 1981). The activities from which Petitioners were enjoined differ from those permitted under the statutory scheme. The statute permits a non-attorney to handle undisputed and uncontested claims arising under life, accident and health insurance policies, but does not authorize a non-lawyer to enter into a contingency fee contract with an injured party, to represent that party in negotiations with the insurer or to approve a settlement. As long as some question of the damages incurred is unresolved, the claim is a disputed and contested one.

C. The Texas Courts' Exertion of Jurisdiction Over Petitioners Did Not Exceed the Limits of Due Process.

Petitioners finally argue that the state courts' assertion of jurisdiction in the injunction litigation exceeds the limits of due process. Petitioners' argument relies on the statutory provision that the administration of the Texas Insurance Code is vested in the State Board of Insurance and injunctions may be brought by the Attorney General. Again Petitioners' reliance on these statutory provisions is misplaced. The statutory provision on which Petitioners rely deals with the Managing General Agents Licensing Act, not the provisions regarding insurance adjusters. Tex. Ins. Code Art. 21.07-3, *et seq.* The provision dealing with licensing of insurance adjusters is found in Tex. Ins. Code Art 21.07-4, *et seq.*

The thrust of Petitioners' argument is that Ron Brown is a licensed insurance adjuster. Therefore, the argument continues, Brown is only subject to, review and administration under the Insurance Code. The fallacy in Petitioners' argument is that the activities from which they were enjoined are not the activities of an insurance adjuster as set forth in the statute. The courts of the State of Texas are vested with the authority to regulate the practice of law. To the extent activities of a purported insurance adjuster violate regulations concerning the practice of law, the Texas courts have jurisdiction to enter rulings on the subject.

II. THE SUMMARY JUDGMENT AND DISMISSAL ENTERED BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS IS CORRECT.

A. The Fifth Circuit Correctly Applied the Law in Determining That Petitioners Did Not Have Standing to Bring an Antitrust Claim and Did Not Raise Any Violation of Any Existing Constitutional Right.

Petitioners argue that Respondents somehow violated the antitrust laws by enjoining Petitioners from certain activities determined to be the unauthorized practice of law. The District Court and the Court of Appeals determined that Petitioners had no standing to raise such a claim. In order to have standing to assert a private antitrust claim a party must claim that a legally cognizable business or property has been injured by the alleged antitrust activity. Because the "business" in which Petitioners engaged was determined to be the unauthorized practice of law, there was no legally cognizable business or property injured by the alleged antitrust violation. *Turner v. American Bar Association*, 407 F. Supp. 451, 479 (N.D. Tex. 1975), *aff'd sub. nom. Pilla v. American Bar Association*, 542 F.2d 56 (8th Cir. 1976) and *Taylor v. Montgomery*, 539 F.2d 715 (7th Cir. 1976) (multi-district litigation). The state court decision found that Petitioners violated Texas law prohibiting the unauthorized practice of law. Petitioners' business is not legally cognizable, and therefore, is not protected by the antitrust laws. The regulatory activities of the states in regard to professional behavior are compelled by the state acting as a sovereign. *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-60 and at n. 11, (1977). Such regulatory activities by a state do not violate the antitrust laws. *See Id.* (citing

Parker v. Brown, 317 U.S. 341 (1943)). Petitioners have been prohibited by the Texas courts from representing clients with disputed liability claims in a manner that constitutes the practice of law. There is no constitutional guarantee that entitles Petitioners, as non-lawyers, to represent other people in litigation. *Guajardo v. Luna*, 432 F.2d 1324, 1325 (5th Cir. 1970). *Novak v. Beto*, 320 F. Supp. 1206, 1210 (S.D. Tex. 1970), *aff'd in part, reversed in part* 453 F.2d 661 (5th Cir. 1971) *cert. denied*, 409 U.S. 968 (1972). State laws prohibiting the unauthorized practice of law do not violate the First, Fifth or Fourteenth Amendments. *Lindstrom v. State of Illinois*, 632 F. Supp. 1535, 1538-39 (N.D. Ill. 1986), *appeal dismissed*, 828 F.2d 21 (7th Cir. 1987)

Petitioners' assertion of the Noerr-Pennington doctrine is inapplicable in this case. *See Eastern Railroad Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 637 (1965). The determination by the Texas courts that Petitioners are not entitled to engage in specific activities means that Petitioners do not have a right to compete. Therefore, the litigation cannot be an integral part of a scheme to destroy competition.

B. There is No Conflict in the Circuits.

Petitioners attempt to argue there is some conflict in the cases, but all of the cases cited are from state courts and deal with what activities are permitted and what activities are prohibited as the unauthorized practice of law. These cases have been discussed above. Petitioners do not cite any conflict in the cases decided by the Courts of Appeal.

III. THE RULINGS OF THE COURTS BELOW WERE CORRECT.

Petitioners next argue that in granting the motion for summary judgment and dismissal the District Court decided an issue of fact. Petitioners erroneously assert that the underlying state court judgment was procured by the very same Respondents as appear here. As discussed above, only some of the Respondents before this Court participated in any way in the state court action. The determination made by the District Court involved only issues of law and no factual issues. The only issues were whether Petitioners could raise a private antitrust claim or a constitutional claim under the First, Fifth or Fourteenth Amendments. As previously addressed, Petitioners do not have standing to assert a private antitrust claim because they do not seek to protect a legally cognizable business. Petitioners only seek to raise an equal protection claim or a due process claim based on the Texas statutory provisions concerning insurance adjusters. The inapplicability of a due process or equal protection claim to these provisions is also addressed above.

CONCLUSION

Throughout their petition, Petitioners attempt to confuse the various Texas court judgments and the judgments of the federal courts. Although the federal court judgments necessarily involve the state court judgments, this petition for writ of certiorari is based on the determination by the federal courts that Petitioners failed to raise either a private antitrust claim or a constitutional claim. Procedurally, Petitioners' petition for writ of certiorari does not arise from the decisions of the Texas courts. Instead, it arises from the judgment of the federal district court and the affirmance of that

judgment by the Court of Appeals for the Fifth Circuit. Petitioners do not raise any issue which needs to be addressed by this Court. There is no conflict between the federal court decision and the decisions of the state courts of last resort. Additionally, there is no conflict between the decisions of the various circuit courts of appeal. Finally, there is no compelling issue requiring a determination by this Court. Moreover, the rulings of the federal district court and the federal court of appeals are correct on the merits as a matter of law. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

JAMES E. COLEMAN, JR.
Counsel of Record
THERESA A. COUCH
CARRINGTON, COLEMAN,
SLOMAN & BLUMENTHAL
200 Crescent Court
Suite 1500
Dallas, Texas 75201
(214) 855-3000

Counsel for Respondents Vial, Hamilton, Koch & Knox, Byron L. Falk, Touchstone, Bernays, Johnston, Beall & Smith, Wade C. Smith, Sidney H. Davis, Jr., Passman, Jones, Andrews & Holley, Shannon Jones, Jr., Johnson, Bromberg & Leeds, Robert R. Roby, Robert W. Hartson, Inc., Robert W. Hartson, State Farm Mutual Automobile Insurance Co., Harlan D. Holiner, Donovan Elliott, Ohio Casualty Insurance Co., Trelby Edwards, Dick Gallatin, Fireman's Fund Insurance Co., Ron Watson, Van Sims